

103 KAR 30:190. Interstate and foreign commerce.

RELATES TO: KRS 139.010, 139.105, 139.260, 139.340, 139.470, 139.486

STATUTORY AUTHORITY: KRS 131.130(1)

NECESSITY, FUNCTION, AND CONFORMITY: To interpret the sales and use tax law as it applies to sales in interstate and foreign commerce.

Section 1. The purpose of this administrative regulation is to state generally the application of the Commerce Clause of the Constitution of the United States to the Sales and Use Tax Law.

Section 2. Sales Tax: Transactions Consummated in Kentucky. (1) Where tangible personal property is located in this state at the time of its sale (or is subsequently produced in this state), and then delivered in this state to the purchaser, the seller is subject to the sales tax if the sale is at retail and is consummated in Kentucky. A sale is not presumed to be made in interstate commerce if the purchaser or his representative receives physical possession of such property in this state. This is true notwithstanding the fact that the purchaser may after receiving physical possession of the property in this state transport or send the property out of the state for use outside the state or for use in the conduct of interstate commerce.

(2) The sales tax does not apply to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods sold from a point in this state to a point outside this state, not to be returned to a point within this state, provided that such delivery is actually made. The tax does not apply to gross receipts from sales in which the seller, under the terms of his agreement with the purchaser, delivers the goods by carrier or by mail from a point in this state to a point outside this state not to be returned to a point within this state.

(3) Pursuant to KRS 139.470(5), the sales tax does not apply to gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading, whether the freight is paid in advance or the shipment is made freight charges collect, to a point outside this state and the property is actually transported to an out-of-state destination for use by the carrier in the conduct of its business as a common carrier. Normally, when a sale by a Kentucky retailer involves a transfer of title and possession of the goods to the purchaser outside this state, the sale is not subject to Kentucky sales tax. The purpose of the exemption in KRS 139.470(5) is to place common carriers on the same footing as other out-of-state purchasers who take title and possession of goods out-of-state without requiring retailers to use some other common carrier to transport the goods out-of-state to the purchasing common carrier. Thus, the exemption only applies to tangible personal property shipped as cargo via the purchasing carrier. It does not apply to tangible personal property placed in use by the purchasing common carrier in this state. Examples of when the exemption does apply include: bulk purchases of inventory items by a common carrier for immediate transport and storage outside this state; purchases of tangible personal property by a common carrier for immediate shipment out-of-state without removal of the property from its original container within this state; and purchases of jet fuel by a common carrier placed in a tanker vehicle in this state for immediate transport out-of-state where the fuel will be placed in the tanks of the planes which will consume it. Examples of when the exemption does not apply include: purchases of repair parts by a common carrier for the carrier's own vehicles which are installed within this state; purchases of components and furnishings for the common carrier's vehicles which are placed in use in this state; and purchases of jet fuel placed in the tanks of the carrier's plane which will consume it regardless of whether all of the fuel purchased will be consumed within this state. Mere compliance with the bill of lading requirements of the exemption statute does not entitle a purchase to exempt status if the tangible personal property is placed in use before leaving this state.

(4) The sales tax does not apply to gross receipts from sales of property sold to a foreign purchaser for shipment abroad and delivered to a ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property abroad and actually carried to a foreign destination, title and control of the property passing to the foreign purchaser upon delivery, and no portion of the property being used or consumed in the United States.

(5) The sales tax does not apply to gross receipts from sales of industrial machinery as defined by KRS 139.486 when such machinery is delivered to a manufacturer or processor, or their agent for use out of state. Industrial machinery will be presumed for sale, use, storage or consumption out of state if:

(a) Delivery is to a common carrier, whether chosen by the seller or by the purchaser, and whether F.O.B. seller's shipping point or F.O.B. purchaser's destination, provided the shipping document indicates delivery to a location outside the state; or

(b) Delivery is made by seller's own transportation vehicles to a location outside the state.

(6) To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within this state to a point outside this state under the terms of an agreement with the purchaser, the seller will be required to retain in his records documentary evidence which satisfies the cabinet that there was such an agreement and a bona fide delivery outside this state of the property which was sold.

Section 3. Use Tax: Transactions Consummated Outside Kentucky. (1) The use tax applies to sales consummated outside Kentucky when the tangible personal property sold is shipped to the purchaser in this state. Examples of such transactions include:

(a) An order for goods is completed and accepted (consummated) outside Kentucky and the seller's branch office or other place of business in this state is utilized in any way, such as in receiving the order, distributing the goods, and/or billing for the merchandise, or

(b) An order for goods is given in this state to an agent of an out-of-state seller who transmits the order to a point outside Kentucky for acceptance, or

(c) An order for goods results from the solicitation in this state of the purchaser by an agent of an out-of-state seller and the order is sent by the purchaser directly to a point outside Kentucky for acceptance.

(2) The use tax applies with respect to any tangible personal property purchased for storage, use or other consumption in this state, the sale of which is exempt from sales tax under this administrative regulation, except property not subject to the sales or use tax or property held or stored in this state for sale in the regular course of business or subsequent use solely outside this state, and except property purchased for use in interstate or foreign commerce, placed in use in interstate or foreign commerce, prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce.

(3) "Storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state.

Section 4. The term "consummated" as used in this administrative regulation means the point at which a sales transaction is completed and accepted to the extent that both the seller and the purchaser are legally committed to fulfill the transaction. (SU-44; 1 Ky.R. 707; eff. 5-14-1975; Am. 9 Ky.R. 1153; eff. 5-4-1983; 12 Ky.R. 1601; eff. 5-6-1986; TAm eff. 6-22-2016.)